A

Public Prosecutor v Ali bin Ahmad

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO BA-41H-90–03 OF 2018
MEOR HASHIMI JC
7 APRIL 2019

C *Criminal Law — Appeal — Appeal against sentence — Respondent charged with offence under s 354 of the Penal Code for outraging modesty — Respondent pleaded guilty — Respondent was convicted — Duty of the trial court in imposing sentence — Mitigation and aggravating factors to be considered — Whether sentence passed by learned magistrate should be disturbed or retained* D *— Whether sentence passed was manifestly inadequate or manifestly excessive — Criminal Procedure Code s 289 — Penal Code s 354*

This was an appeal by the public prosecutor ('the appellant') on the sentence imposed on the respondent. The respondent was charged under s 354 of the E Penal Code ('the PC') for outraging modesty. The respondent had pleaded guilty when the charge was read and explained and sentenced with a fine of RM5,000 in default six months imprisonment. The appellant submitted that the sentence imposed by the learned magistrate was manifestly inadequate and did not reflect the seriousness of the offence and also had not taken into F account the public interest. Further, it was argued that the sentence imposed had given preference to the interest of the respondent by putting undue importance to his mitigation pleas. The issues for determination were: (a) whether the sentence passed by the learned magistrate should be disturbed or retained; and (b) whether the sentence passed was manifestly inadequate or G manifestly excessive.

Held, dismissing the appeal:

(1) The sentence imposed by the learned magistrate was within the ambit of s 354 of the PC. The learned magistrate had followed the established H judicial principles in taking into account public interest, plea of guilt and age of the respondent before sentencing the respondent. Further, the learned magistrate did not err in giving due consideration of the remand period and eventually had not imposed a sentence of imprisonment to the respondent (see paras 30–31). I

(2) The amount of fine of RM5,000 was five times the amount of the respondent's current salary as a security guard. Considering the background of the respondent and the seven days period that the respondent was remanded, the sentence of fine was appropriate and just

in the circumstances of the case. The sentence was not manifestly inadequate. In the event that the respondent fails to pay the fine, the six months' imprisonment will take effect. Section 354 of the PC also provided a sentence of whipping. Since the respondent was 50 years of age at the time of sentencing, whipping was not allowed as provided under s 289 of the Criminal Procedure Code (see paras 35–36).

(3) The learned magistrate did not err in passing the sentence on the respondent. The learned magistrate had taken into account all relevant factors before coming to the decision. It was settled law that sentencing was a matter of judicial discretion of the trial court. The fine of RM5,000 imposed by the learned magistrate was appropriate and just and it had not occasioned an error of principle of law. The sentence was not manifestly or grossly inadequate. This was not a fit and proper case for appellate intervention (see paras 27, 38 & 41).

[Bahasa Malaysia summary

Ini merupakan rayuan pendakwa raya ('perayu') terhadap hukuman yang dijatuhkan terhadap responden. Responden dituduh di bawah s 354 Kanun Keseksaan ('KK') kerana mencabul kehormatan. Responden telah mengaku salah apabila pertuduhan dibacakan dan diterangkan dan dihukum dengan denda RM5,000 sekiranya gagal bayar enam bulan pemenjaraan. Perayu menghujahkan bahawa hukuman yang dijatuhkan oleh majistret terpelajar adalah tidak memadai dan ianya tidak mencerminkan keseriusan kesalahan dan gagal untuk mengambil kira kepentingan awam. Lanjutan itu, ianya di hujahkan bahawa hukuman yang dikenakan memberatkan kepentingan responden dengan meletakkan kepentingan kepada hujahan mitigasinya. Isu untuk ditentukan adalah sama ada: (a) hukuman yang diketepikan oleh majistret terpelajar harus di ganggu atau dikekalkan; dan (b) sama ada hukuman yang dijatuhkan adalah tidak memadai atau melampau.

Diputuskan, mengetepikan rayuan:

(1) Hukuman yang dijatuhkan oleh majistret terpelajar adalah sepertimana dibenarkan s 354 KK. Majistret terpelajar telah mematuhi prinsip-prinsip kehakiman sewaktu mengambil kira faktor kepentingan awam, pengakuan salah dan umur responden sebelum menjatuhkan hukuman kepada responden. Lanjutan itu, majistret terpelajar tidak terkhilaf dalam menimbangkan tempoh reman dan kemudiannya tidak mengenakan hukuman pemenjaraan kepada responden (lihat perenggan 30–31).

(2) Jumlah denda RM5,000 adalah lima kali jumlah gaji semasa responden sebagai seorang pengawal keselamatan. Mengambil kira latar belakang responden dan tempoh tujuh hari responden di reman, hukuman denda adalah wajar dan adil berdasarkan keadaan kes. Hukuman tersebut

bukanlah tidak memadai. Dalam keadaan responden gagal untuk membayar denda, tempoh pemenjaraan enam bulan akan berjalan. Seksyen 354 KK juga memperuntukkan hukuman sebatan. Memandangkan responden berusia 50 tahun pada waktu hukuman dijatuhkan, sebatan tidak dibenarkan sepertimana diperuntukkan di bawah s 289 Kanun Tatacara Jenayah (lihat perenggan 35–36).

(3) Majistret terpelajar tidak terkhilaf dalam menjatuhkan hukuman terhadap responden. Majistret terpelajar mengambil kira semua fakta yang relevan sebelum membuat keputusan. Adalah menjadi undang-undang mantap bahawa menjatuhkan hukuman adalah budi bicara kehakiman mahkamah bicara. Denda RM5,000 yang dijatuhkan oleh majistret terpelajar adalah memadai dan adil dan tidak menyebabkan kekhilafan prinsip undang-undang. Hukuman yang dijatuhkan tidaklah tidak memadai. Ini tidak merupakan kes yang sesuai untuk campur tangan rayuan (lihat perenggan 27, 38 & 41).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Mohd Tahir Bahtiar dan satu lagi lwn Pendakwa Raya dan satu lagi [2018] MLJU 257; [2018] 8 CLJ 174, CA (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohd Nooh bin Yusof & Ors [1993] MLJU 271; [1993] 4 CLJ 275, HC (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45, HC (refd)
R v Boyd [1980] 2 Cr App R(S) 234 (refd)
R v Ipeelee [2012] 2 CNLR 218, SC (refd)
R v James Henry Sargeant [1974] 60 Cr App R 74 (refd)
R v Kenneth John Ball [1951] 35 Cr App R 164 (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134, FC (refd)
Tan Lay Chen v PP [2001] 1 MLJ 135; [2000] 4 CLJ 492, HC (refd)
Zaidon bin Shariff v PP [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

Legislation referred to

Criminal Procedure Code ss 173(b), 289
Penal Code s 354

Mohd Raimi bin Mohd Ramly (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Mohd Fahmy bin Mohd Sulaiman (Azharudin & Assoc) for the respondent.

Meor Hashimi JC:

INTRODUCTION

[1] This is an appeal by the public prosecutor on the adequacy of sentence imposed on the respondent by the learned magistrate on 15 December 2017. The respondent in this case was charged under s 354 of the Penal Code for outraging modesty, an offence punishable with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two of such punishments.

[2] The said charge was read and explained to the respondent. The respondent pleaded guilty to the charge and understood the charge and the nature and consequences of his plea. The respondent was convicted and sentenced with a fine of RM5,000 in default, six months' imprisonment.

[3] Aggrieved by a lenient sentence imposed by the learned magistrate, the appellant appealed to this court. The appellant's complaint is essentially the sentence imposed is manifestly inadequate and the learned magistrate did not take into account the seriousness of the offence and public interest.

THE CHARGE

[4] The charge preferred against the respondent in the magistrate's court is as follows:

> Bahawa kamu pada 18/8/2015 jam lebih kurang 7.00 petang hingga 8.10 malam semasa berada di dalam bas express Transnasional jenis Saewoo no. pendaftaran WSR 7958, di bahu jalan Putrajaya 8.5, Jalan Lingkaran Putrajaya, dalam daerah Sepang di dalam Negeri Selangor telah melakukan kesalahan mencabul kehormatan dengan memegang tangan, menyelak baju dan sentuh buah dada kiri pengadu dan memasukkan tangan dalam seluar serta meraba kemaluan Nur Wahidah bt Roslee KPT: 850927-04-5206. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 354 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

FACTS OF THE CASE

[5] The facts of the case as admitted by the respondent are as follows:

1. Tertuduh, Ali bin Ahmad telah dituduh di bawah seksyen 354 Kanun Keseksaan dan mengaku salah atas pertuduhan.

2. Pada 15/8/2015 jam lebih kurang 4.00 petang, pengadu, Nor Wahidah binti Roslee menaiki bas Transnasional No pendaftran WSR 7958 dari Melaka ke Putrajaya yang dipandu oleh tertuduh. Pengadu duduk di tempat duduk (*seat*) penumpang baris No 2 dari belakang tempat duduk pemandu bas (tertuduh).

3. Tujuan pengadu menaiki bas tersebut ke Putrajaya adalah untuk pergi ke rumah sepupu, Ermaniza Shuhada binti Baharudin kerana pengadu mempunyai temujanji dengan doktor di Hospital Kuala Lumpur untuk rawatan sakit tiroid yang dihadapi pengadu.

4. Semasa bas bergerak dari Melaka Sentral menuju ke Putrajaya, bas berhenti di salah sebuah hentian rehat dan rawat (R & R) dan tertuduh mengalihkan penumpang-penumpang yang berada di dalam bas ke dalam sebuah bas yang lain. Penumpang yang tinggal di dalam bas tersebut hanya 8 orang termasuk pengadu.

5. Apabila bas yang dinaiki pengadu sampai di Terminal Bas TBS, Serdang, 7 orang penumpang turun dan hanya tinggal pengadu, 1 penumpang dan pemandu bas (tertuduh). Kemudian 1 orang penumpang lagi turun sebelum bas yang dipandu tertuduh berhenti mengisi minyak di Petronas. Oleh itu, hanya tinggal pengadu dan tertuduh sahaja dalam bas tersebut.

6. Selepas tertuduh mengisi minyak di Petronas, bas bergerak menuju ke Putrajaya Sentral. Semasa dalam perjalanan menuju ke Putrajaya, tertuduh secara tiba-tiba telah memberhentikan bas di bahu jalan Putrajaya 8.5, Jalan Lingkaran Putrajaya, Sepang. Semasa itu, pengadu masih duduk di tempat duduk (*seat*) penumpang baris No 2 dari belakang tempat duduk pemandu bas (tertuduh).

7. Tertuduh telah mematikan enjin bas dan pergi ke tempat duduk pengadu. Tertuduh telah melakukan sentuhan dengan memegang belakang pinggang pengadu. Tertuduh kemudian bangun dan bergerak semula ke tempat duduk pemandu bas. Tertuduh menyuruh pengadu berpindah ke tempat duduk penumpang di belakang tempat duduk pemandu bas. Disebabkan rasa takut, pengadu berpindah ke tempat duduk penumpang di belakang tempat duduk pemandu bas.

8. Secara tiba-tiba tertuduh yang berada di tempat duduk pemandu bas telah meraba kaki pengadu dan menarik pengadu ke hadapan sehingga pengadu terduduk di atas pangku/paha tertuduh. Tangan kanan tertuduh kemudian terus menyeluk seluar pengadu dan memegang kemaluan pengadu. Manakala tangan kiri tertuduh meraba payu dara kiri pengadu. Tertuduh dengan pantas mengambil tangan kiri pengadu dan meletakkan tangan kiri pengadu di kemaluan tertuduh.

9. Pengadu cuba melepaskan diri daripada tertuduh. Apabila pengadu berjaya melepaskan tangan tertuduh dari memegang kemaluan pengadu, pengadu terus berlari ke belakang bas. Tertuduh mengejar pengadu sehingga pengadu terjatuh akibat tersandung melanggar kusyen tempat duduk penumpang belakang bas. Tertuduh menarik baju pengadu sehingga baju pengadu koyak di bahu kiri. Tertuduh kemudian selak baju

pengadu di bahagian bawah. Pengadu menjerit meminta pertolongan dan merayu kepada tertuduh untuk melepaskan pengadu. Tertuduh memberi syarat akan melepaskan pengadu sekiranya pengadu memberikan No telefon pengadu kepada tertuduh dan disebabkan ketakutan pengadu bersetuju dengan syarat tersebut.

10. Selepas itu, tertuduh meneruskan pemanduan bas menuju ke Putrajaya Sentral. Tertuduh berpesan kepada pengadu untuk tidak menceritakan kejadian kepada sesiapa. Pengadu telah menceritakan kejadian tersebut kepada sepupu dan suaminya dan kemudian pengadu membuat laporan polis.

11. Pada 19/8/2015 jam lebih kurang 5.00 petang, Inspektor Husny bin Hussein serta anggota tangkapan telah menangkap tertuduh di perkarangan IPD Sepang, Selangor.

12. Hasil siasatan mendapati tertuduh merupakan pemandu bas Transnasional No pendaftaran WSR 7958 pada masa kejadian berlaku pada jam 7.00 petang sehingga jam 8.10 malam di dalam bas Transnasional tersebut di bahu jalan, Putrajaya 8.5, Jalan Lingkaran Putrajaya. Pengadu dapat camkan tertuduh sebagai orang yang telah mencabulnya dalam bas tersebut.

13. Hasil siasatan mendapati tertuduh telah dengan sengaja mencabul kehormatan pengadu dengan memegang tangan, menyelak baju pengadu, menyentuh buah dada kiri pengadu, memasukkan tangan ke dalam seluar pengadu dan meraba kemaluan pengadu sehingga menimbulkan ketakutan ke atas pengadu.

14. Oleh yang demikian, tertuduh telah melakukan kesalahan yang boleh dihukum di bawah seksyen 354 Kanun Keseksaan.

SECTION 354 OF THE PENAL CODE

[6] Section 354 of the Penal Code provides as follows:

> Assault or use of criminal force to a person with intent to outrage modesty
>
> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

PLEA OF GUILTY BY THE RESPONDENT

[7] Pursuant to s 173(b) of the Criminal Procedure Code, the charge was read and explained to the respondent and that the respondent, having understood the nature and consequences of pleading guilty, had eventually pleaded guilty to the charge, without qualification. Further, when the facts of the case were read and explained to him, the respondent then admitted the facts

of the case and also the exhibits tendered by the prosecution.

[8] The learned magistrate, upon being satisfied with the respondent's plea of guilty, without qualification, then convicted and sentenced the respondent to a fine of RM5,000, in default, six months' imprisonment.

APPEAL ON SENTENCE

The appellant's submission

[9] The learned DPP for the appellant had submitted that the sentence imposed by the learned magistrate is manifestly inadequate and does not reflect the seriousness of the offence and also has not taken into account the public interest. It was further argued that the sentence imposed had given preference to the interest of the respondent by putting undue importance to his mitigation pleas. As such, it appears that the interest of respondent has outweighed the public interest.

The respondent's submission

[10] The learned counsel for the respondent submitted that the learned magistrate has duly and rightly considered the mitigation factors submitted by the respondent and has not committed any errors of law or principles when sentencing the respondent, which warrants an interference of this court.

[11] It was contended by the respondent that the sentence imposed by the learned magistrate is within and in accordance with the law as provided in s 173(b) of the CPC and that a guilty plea of the respondent ought to be considered in favour of the respondent.

[12] The respondent had pleaded guilty at the earliest available opportunity and the respondent's decision had definitely saves much judicial time of a lengthy trial and inconvenience of many, particularly the witnesses and also saves costs to the parties involved. In addition to that, it is a good indicator that the respondent is remorseful and regretted for committing the offence.

[13] It was also contended by the respondent that another relevant factor to be considered by the learned magistrate is that the respondent was a first offender and had no previous convictions.

SENTENCE ACCORDING TO LAW

[14] In *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, Mohamed Azmi J (as His Lordship then was) made the following observation:

A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused. (Emphasis added.)

[15] A similar observation was made by Augustine Paul JC (as His Lordship then was) in *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 and said:

The phrase 'pass sentence according to law' in the subsection adverted to means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chong Cheng Hoe & Ors* [1966] 2 MLJ 252; *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315 and *Phillip Lau Chee Heng v Public Prosecutor* [1988] 3 MLJ 107). The right to determine the quantum of punishment on a guilty party is absolutely in the discretion of the trial Court. It will exercise that power judicially and will not tolerate any encroachment or even semblance of encroachment by either the prosecution or the defence in respect of that right. (Emphasis added.)

[16] In *Tan Lay Chen v Public Prosecutor* [2001] 1 MLJ 135; [2000] 4 CLJ 492, Augustine Paul J (as His Lordship then was) made the following observation:

The phrase 'pass sentence according to law' in the subsection means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v Public Prosecutor* [1988] 3 MLJ 107). *The assessment of a sentence in accordance with judicial principles clearly contemplates, inter alia, a consideration of the mitigating circumstances in favour of the person to be sentenced. It is generally accepted that an accused person should be given credit or discount for pleading guilty* (see *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74; *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441; *Lee Say & Ors v Public Prosecutor* [1985] 2 CLJ 155). The severity of the offence committed may outweigh the mitigating affect of a guilty plea (see *Loh Hock Seng v Public Prosecutor* [1980] 2 MLJ 13, *Public Prosecutor v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537; *R v Costen* (1989) 11 Cr App R (S) 182). Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181). Be that as it may, as I said earlier it must not be overlooked that the general rule is that an accused should

A be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentencer. *This is because an accused person* B *expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor.* Failure to do so will lead to the criticism, as in this case, that the plea has not been taken into account in imposing sentence. In this case the learned sessions court judge had not explained why he had disregarded the guilty C plea, and, by the same process of reasoning, the clean record of the accused. This is a misdirection in law. (Emphasis added.)

[17] In *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45, Visu Sinnadurai J made the following observation:

D It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial. This rule however, is not a strict rule as the court may, in exercise of their discretion, in exceptional cases, refuse to grant any discount: see for example E *Lee Say & Ors v Public Prosecutor*.

[18] Similarly in the Federal Court decision of *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134, Lee Hun Hoe CJ (Borneo) observed:

F Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

G **[19]** The Supreme Court in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 adopted with approval the views expressed by Cumming-Bruce LJ in *R v Boyd* [1980] 2 Cr App R(S) 234 where he said:

H The policy of the court is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty.

PRINCIPLES OF SENTENCING

I

[20] The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence. This court is guided by the observation of Raja Azlan Shah Ag LP (as His Royal Highness then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 as follows:

Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had the occasion to say elsewhere, that the very concept of judicial discretion involves the right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525).

It is for that reason for some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardian of the public interest. (Emphasis added.)

[21] Hashim Yeop A Sani J (as His Lordship then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 had made the following observation that often guide a sentencing court:

In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to de decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable only if because of the human element involved. But, of course, there must be limits to permissible variations.

The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence *unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence*. It is firmly established practice that the court will not alter a sentence merely because it might have passed

a different sentence. One of the main considerations is the assessment of sentence is of course the question of public interest. (Emphasis added.)

[22] The aims of sentencing was aptly described by Lawton LJ in the case of *R v James Henry Sargeant* [1974] 60 Cr App R 74. His Lordship observed:

> What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. *Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.* (Emphasis added.)

[23] This court also takes guidance from the case of *R v Kenneth John Ball* [1951] 35 Cr App R 164 where Hilbery J made the following observation:

> *The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living*. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. *Not only in regard to each crime, but in regard to each criminal, the court has the right and duty to decide whether to be lenient or severe.* (Emphasis added.)

[24] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193, the Federal Court speaking through Mohamed Dzaiddin CJ, states:

> It is of the upmost importance to stress here that the appellate court will not normally alter sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *PP v Loo Choon Fatt* [1976] 2 MLJ 256.

[25] In *Mohd Tahir Bahtiar dan satu lagi lwn Pendakwa Raya dan satu lagi* [2018] MLJU 257; [2018] 8 CLJ 174, Mohd Zawawi Salleh JCA (as His Lordship then was) had made the following observation:

> Prinsip yang mengawal mahkamah yang mendengar rayuan terhadap hukuman yang dijatuhkan oleh mahkamah bawahan adalah mantap — mahkamah rayuan tidak mempunyai budi bicara yang tidak terbatas ('unfettered discretion') untuk mengulang kaji hukuman yang dijatuhkan oleh mahkamah bawahan. Skop untuk campur tangan oleh mahkamah yang mendengar rayuan adalah terhad kerana penghukuman adalah sebahagian besarnya merupakan budi bicara kehakiman yang memerlukan 'a fine balancing of myriad considerations'. Justeru, terdapat ruang bagi orang yang munasabah untuk mempunyai pendapat yang berbeza. Oleh sebab itu, prerogatif mahkamah yang mendengar rayuan untuk mengubah hukuman

dibatasi oleh keperluan untuk memberikan penghormatan ('deference') kepada budi bicara hakim bicara dalam menjatuhkan hukuman.

Pada lazimnya, mahkamah yang mendengar rayuan akan mengubah hukuman yang dijatuhkan oleh hakim bicara sekiranya dapat ditunjukkan bahawa hukuman tersebut adalah terlalu berat atau terlalu ringan/tidak mencukupi. Justeru, sesuatu hukuman yang dijatuhkan oleh hakim bicara tidak akan diubah semata-mata kerana hukuman itu berat atau ringan tetapi hendaklah terlalu berat ('manifestly excessive') atau terlalu ringan ('manifestly inadequate'). Batas sempadan ('threshold') untuk dipenuhi adalah tinggi sebelum campur tangan dapat dilakukan.

ANALYSIS OF THIS COURT

[26] This court had referred to the principles of sentencing decided in the above stated cases in particular the recent case of *Mohd Tahir Bahtiar & Anor v Public Prosecutor*, and is of the opinion that there are two issues to be considered by this court:

(a) whether the sentence passed by the learned magistrate should be disturbed or retained; and

(b) secondly, this court will dwell into the issue of proportionality. This would render the question whether the sentence passed was manifestly inadequate or manifestly excessive.

[27] Based on the above stated principles, this court finds that the learned magistrate did not err in passing the sentence on the respondent. The learned magistrate had taken into account all relevant factors before coming to the decision. The learned magistrate had considered the mitigation factors submitted by the respondent's counsel and also the submission of the learned DPP. It is settled law that sentencing is a matter of judicial discretion of the trial court.

[28] As decided in *Zaidon Shariff v Public Prosecutor* the mitigation plea of the respondent should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in the light of the facts of each case, and more so when it is not contradicted by the prosecution. In this regard, the learned magistrate had given due consideration and weightage to the mitigation factors in favour of the respondent.

[29] In *Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270, Hashim Yeop Sani J (as he then was) dealt with the principles of plea of mitigation and observed:

No plea in mitigation should be thrown aside lightly but must be examined and

considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

[30] The sentence passed by the learned magistrate was within the ambit of s 354 of the Penal Code. The learned magistrate had followed the established judicial principles in taking into account public interest, plea of guilt and age of the respondent before sentencing the respondent.

[31] In addition to that, the learned magistrate had also considered and taken into account the period that the respondent had spent in remand in imposing the appropriate sentence on the respondent. This court is of the opinion that the learned magistrate did not err in given due consideration of the said remand period and eventually had not imposed a sentence of imprisonment on the respondent. In other words, the appropriate sentence in this case ought to have been a non-custodial one.

[32] The learned magistrate had considered the background and antecedents of the respondent who was the sole breadwinner for his family and the only caretaker for his disabled mother and his wife who still needs recovery from surgery.

[33] It was also submitted by the respondent's counsel at the hearing of the appeal, the respondent was recently discharged from the National Heart Institute ('IJN') Kuala Lumpur after undergoing coronary artery bypass graft and was given sick leaves for a period of 52 days from 21 October–11 December 2018. According to the counsel, the deteriorating health condition of the respondent warrants special attention and ought to be taken into account by this court on imposing the appropriate sentence on the respondent.

[34] The learned magistrate had also considered the fact that the respondent had stopped work as a driver of the bus company (Transnasional) after the incident. This is also a relevant factor to be considered when imposing the appropriate sentence on the respondent.

[35] The amount of fine of RM5,000 was five times the amount of the respondent's current salary as a security guard. Considering the background of the respondent and the seven days period that the respondent was remanded, the sentence of fine is appropriate and just in the circumstances of the case. The sentence was not manifestly inadequate. For the respondent, the amount of RM5,000 is a big amount and had taken into account the salary of respondent for a period of five months. In the event that the respondent fails to pay the fine, the six months' imprisonment will take effect.

[36] Section 354 of the Penal Code also provides a sentence of whipping. Since the respondent was 50 years of age at the time of sentencing, whipping was not allowed as provided under s 289 of the Criminal Procedure Code. Section 289 of the CPC provides as follows:

> Sentence of whipping forbidden in certain cases
>
> No sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping:
>
> (a) females;
>
> (b) males sentenced to death; and
>
> (c) males whom the court considers to be more than fifty years of age, except males sentenced to whipping under section 376, 377C, 377CA or 377E of the Penal Code.

Therefore, the learned magistrate was right by not sentencing the respondent for whipping.

[37] The next issue to be considered in this appeal is the issue of proportionality of the sentence. It is trite that the sentence must be proportionate to both seriousness of the offence and the degree of responsibility of the offender. The concept of proportionality was explained in the Canadian Supreme Court case of *R v Ipeelee* [2012] 2 CNLR 218 where LeBel J had made the following observation:

> The fundamental principle of sentencing (ie proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J expressed in her concurring judgment in *Re BC Motor Vehicle Act* [1985] 2 SCR 486 at p 533:
>
> > It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a 'fit' sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system.
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects

both perspectives on proportionality and does not elevate one at the expense of the other.

Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived Charter scrutiny, a highly individualised process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognised the scope of this discretion and granted considerable deference to a judge's choice of sentence. As Lamer CJ stated in *R v M (CA)* [1996] 1 SCR 500 at para 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only interfere to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code (emphasis in original).

There are limits, however, to the deference that will be afforded to a trial judge. Appellate courts have a duty to ensure that courts properly apply the legal principles governing sentencing. In every case, an appellate court must be satisfied that the sentence under review is proportionate to both the gravity of the offence and the degree of responsibility of the offender.

[38] In line with the principle of proportionality, it is the duty of this court to fairly consider between the aggravating factors and mitigating factors submitted by learned DPP and the respondent's counsel in court. This court is of the opinion that the fine of RM5,000 imposed by the learned magistrate was appropriate and just. The sentence was not manifestly or grossly inadequate. As observed by Justice Hilbery in *R v Kenneth John Ball* that the public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

[39] Similarly in *Raja Izzuddin Shah v Public Prosecutor* Hashim Yeop Sani J (as His Lordship then was) observed:

> *Considering all the facts before the court, come to the conclusion that the public interest is in no way better served by committing the appellant to prison*. The primary purpose of punishment is reformatory and it is clear in this case that the appellant has realised the fact that notwithstanding his status he is not above the law. He has also clearly stated that he has repented and would not make the same mistake again. Under the circumstances the public interest is best served by setting aside the sentence of imprisonment and substituting therefor an order under s 294(i) of the Criminal Procedure Code that the appellant enter into a bond with one surety in the sum of one thousand dollars for a period of two years and in the meantime to keep peace and be of good behaviour. (Emphasis added.)

[40] After considering the reasons given by the learned magistrate, this court does not intend to disturb the findings by the learned magistrate on the sentence imposed on the respondent. It is of the utmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence.

[41] This court is satisfied that the imposition of a fine of RM5,000 by the learned magistrate has not occasioned an error of principle or law as decided in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor*. After much consideration, this court is of the considered view that this is not a fit and proper case for appellate intervention. The learned magistrate had adequately considered and applied the established principles and guidelines governing sentencing.

[42] In *Public Prosecutor v Mohd Nooh bin Yusof & Ors* [1993] MLJU 271; [1993] 4 CLJ 275, Abdul Malik Ishak JC (as His Lordship then was) observed that in passing sentence, this court ought to have taken into account a long list of factors, namely:

> ...
>
> (7) the plea in mitigation (*Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270;
>
> (8) when a convicted man is sent to prison, he is branded with a social stigma which he carries for the rest of his life;
>
> (9) the English warning in a passage found in *The English Sentencing System by Cross* (3rd Ed) at p 141 to the following effect:
>
> > Prolonged and repeated imprisonment is destructive of family relationship and, by encouraging the prisoner's identification with the attitudes of the prison community, increases his alienation from normal society. In addition, long-term institutionalisation is all too likely to destroy a prisoner's capacity for individual responsibility and to increase the problems he must face when he returns to society.

CONCLUSION

[43] For reasons stated above, the appeal by the appellant is dismissed. The sentence imposed by the learned magistrate on the respondent is accordingly affirmed.

Appeal dismissed.

Reported by Izzat Fauzan